

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re: :  
FISCHER, : Docket #14cv1304  
 : 1:14-cv-01304-PAE-AJP  
 :  
Plaintiff, :  
 :  
- against - :  
 :  
FORREST, :  
 : New York, New York  
Defendant. : May 27, 2016

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PROCEEDINGS BEFORE  
THE HONORABLE HENRY B. PITMAN  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording;  
Transcript produced by transcription service.

INDEXE X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>	<u>Court</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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THE CLERK: Fischer against Forrest, counsel  
please state your name for the record.

MR. CHRISTOPHER GIOIA: Christopher Gioia, Cuomo  
LLC, 200 Old Country Road, Mineola, New York 11501, on  
behalf of the plaintiff, James H. Fischer. Good morning.

THE COURT: Good afternoon.

MR. GIOIA: Excuse me.

MR. SETH HUDSON: Seth Hudson of Clements Bernard,  
4500 Cameron Valley Parkway, Suite 350, Charlotte, North  
Carolina, on behalf of the defendants.

MR. DANIEL CAHN: And Daniel Cahn of Cahn & Cahn,  
PC, 105 Maxess Road, Suite 124, Melville, New York, also for  
the defendants. Good morning, I mean good afternoon, Judge.

THE COURT: Good afternoon all. All right, we are  
today to address some discovery issues. In that regard, I  
have a letter from, a joint letter dated May 23, 2016, which  
annexes interrogatories and document responses and cites,  
well, there's several disputes. There are also -- there are  
several disputes, let's take them in the order in which they  
are raised in the letter.

The first issue is plaintiff advises that  
defendants -- I'm sorry, defendant advises that its second  
set of requests for production of documents served on August  
28, 2015, has not been responded to, what is the status of

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that?

MR. HUDSON: Your Honor, we got those last, or we got responses last night.

THE COURT: Is that for I, II and III?

MR. HUDSON: Yes, Your Honor.

THE COURT: Okay. All right, turning to IV, there are issues with respect to a number of interrogatories, and in V there are a number of issues with respect to document responses. You know, ordinarily my practice is to go through these item by item, I don't like to try to guess why an interrogatory is appropriate or try to guess what the objections are. There are quite a few that are in issue here, I think by my count there are 18 interrogatory responses and 91 document requests. I mean we can go through them, one thing I'm not going to do is I'm not going to rule on them without counsel's input. As I said, I'm not going to read them and try to guess what arguments can be made for and against or try to, you know, have some schizophrenic internal conversation trying to assume I'm defendant one minute and assume I'm plaintiff the next.

Are they all still in issue, are they all still in dispute?

MR. HUDSON: Yes, Your Honor, Mr. Gaia?

MR. GIOIA: Gioia.

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MR. HUDSON: Gioia, sorry, Mr. Gioia and I had some conversations before this conference and I think we can, you know, some of the requests for production we can work out. You know, if Your Honor would like, Mr. --

MR. GIOIA: Gioia.

MR. HUDSON: Gioia, sorry, and I, can take maybe, you know, 15 or 20 minutes, sit down, go through them all, and then, you know, if there's some that we can't work out, that may be easier and save you time.

THE COURT: All right. Look, I'm not trying to give anybody grief here today, but that should have been done before today, the rules require a meet and confer before you raise it with the Court. Why don't you take and go back in the jury room or stay here, wherever you're more comfortable, see what you can work out and then we'll come back and address whatever we need to address.

MR. HUDSON: Thank you, Your Honor.

(OFF THE RECORD)

THE COURT: All right, where do we stand?

MR. HUDSON: All right, Your Honor, just for the record, we did have a meet and confer prior to this --

THE COURT: Good.

MR. HUDSON: But it was not successful, but we were much more successful on this try.

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THE COURT: Good.

MR. HUDSON: So we only have a couple of issues, mainly, you know, what the plaintiffs have agreed to do is to go back in and look at the responses to the interrogatories, requests for production, clean them up, you know, take out some of the objections that aren't appropriate. They're also going to specify what documents respond to which requests under Rule 34 and, you know, and other objections we had dealt with requests for information related to actual damages, but they're going to provide stipulation that they're not going to seek actual damages in this case.

MR. GIOIA: Just to clarify, for lack of damage, we lost profits and we're seeking damages, statutory --

THE COURT: Okay, you're not seeking lost profits, is that right, Mr. Gioia?

MR. GIOIA: That is correct.

THE COURT: Okay, go ahead.

MR. HUDSON: That streamlines this case substantially. Your Honor, the only things that we could not come to an agreement on is some information that Mr. Fischer, he's actually here in the courtroom today, claims is proprietary. We offered up that, you know, we'd be more than happy to have a protective order in this case, we'd

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have a two stage protective order where, you know, it even has attorney's eyes only provision, he still didn't want to turn that information over. I don't know how you'd like to proceed at this point, I'd be more than --

THE COURT: Do you want to tell me what specific request is involved?

MR. HUDSON: Yes, Your Honor, they are, on the interrogatories, would it be helpful to, I've got some highlighted --

THE COURT: No, I've got, they're annexed to the letter, I can --

MR. HUDSON: Okay, it's interrogatory number 2.

THE COURT: All right, identify all persons or entities that plaintiff is aware have used, replicated, or reproduced plaintiff's mark in connection with the sale, offering for sale, distribution and/or advertising of goods and/or services, related to the goods and/or services provided under plaintiff's mark and indicate whether plaintiff has given this person or entity consent, sponsorship or authorization to use plaintiff's mark, that's the one we're talking about?

MR. HUDSON: Yes, Your Honor.

THE COURT: Okay. And my understanding is plaintiff is a manufacturer/wholesaler of products used in

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beekeeping?

MR. GIOIA: That's correct, Your Honor.

THE COURT: And what's the relevance of this?

MR. HUDSON: Your Honor, it's two-fold. One is, you know, we're asking for information about the individuals who have used his mark, that without his permission, if he's allowed people to use his mark without his permission then it goes to the enforceability and the validity of the mark. If he's allowed others to use --

THE COURT: Hold on a second, listen to what, I don't understand what you just said. If he's allowed people to use his mark without his permission, that seems internally inconsistent. How can you allow someone to do something without giving them permission?

MR. HUDSON: Because if I said that I didn't --

THE COURT: Maybe I misunderstood, I am not sure I understand --

MR. HUDSON: It might be my southern drawl.

THE COURT: Are you asking is he aware of other infringers?

MR. HUDSON: Yes, it's two-fold, is he aware of any individuals that are using his mark without his permission.

THE COURT: Okay, so is he aware of other, and



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using the mark for the same product.

MR. HUDSON: Right, or has he allowed others to use his mark for the same product, the validity --

THE COURT: Hold on, how is the former -- look, I understand the relevance of the question is he aware of any other infringers, but the fact that his distributors or the fact that a retailer may sell his product and use the mark with his permission, so what?

MR. HUDSON: Well that goes to what's called a principle called naked licensing. If Mr. Fischer allows someone to use his mark --

THE COURT: It's not naked licensing unless -- it's not naked licensing with respect to products that he's sold.

MR. HUDSON: No, but that's not what I'm asking, I'm asking for products that he allowed others to use, anybody else he allowed to use his name.

THE COURT: No, it's not -- no, you're saying it too broadly. If Coca-Cola sells to a deli and the deli sells genuine Coca-Cola products labeled as Coca-Cola, that's not naked licensing.

MR. HUDSON: I would agree.

THE COURT: Okay. So your question I guess really is has he licensed the, I guess the question is two-fold, is

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2 he aware of any other infringers, has he licensed the mark  
3 or the marks to any one independent of the sale of products  
4 by him. The trademark is a source identifier, so, you know,  
5 if Mr. Fischer sells one of his own products to a  
6 distributor and the distributor uses Mr. Fisher's marks with  
7 products that originate with Mr. Fischer, there is no naked  
8 licensing issue.

9 MR. HUDSON: Right.

10 THE COURT: I mean is there an objection to asking  
11 those questions, to answering those questions, namely is Mr.  
12 Fischer aware of any other infringers or has he licensed the  
13 mark to anyone to use with respect to products other than  
14 products that originate with Mr. Fischer?

15 MR. GIOIA: Yeah, it sounds more like he's asking  
16 for information whether Mr. Fischer has any other lawsuits  
17 available, that's almost what it sounds like to me.

18 THE COURT: No.

19 MR. GIOIA: I guess I'm confused, because, one, we  
20 objected, it's irrelevant to this case, whether other --

21 THE COURT: Well, there is a theory in trademark  
22 law and it, I've seen it mostly discussed in treatises, it's  
23 difficult to, in practice you rarely see it although there  
24 are some old cases, there's a notion of abandonment that if  
25 you don't police a trademark it can become abandoned. The

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2 examples in law school were aspirin, ping-pong, escalator,  
3 which all used to be actually trademarks. And this is why  
4 Xerox used to run ads saying Xerox means their own machines,  
5 not copies made by other photostatic copiers. There's a  
6 notion of abandonment and if he's aware of other infringers  
7 that he hasn't policed there may be a basis for an  
8 abandonment issue.

9           The naked licensing, as far as I understand it,  
10 only comes up when you're licensing the trademark, when  
11 you're separating the power to control the quality of the  
12 product from the trademark, which doesn't exist if he's only  
13 licensing the trademark with respect to products that  
14 originate with him.

15           So I guess my question to you, Mr. Gioia, is would  
16 you be, are you adverse to answering an interrogatory asking  
17 for the names of other infringers, if any, that Mr. Fischer  
18 is aware of, and whether Mr. Fischer has licensed the mark  
19 to anyone to use with respect to products that do not  
20 originate with Mr. Fischer?

21           MR. GIOIA: To address the first point, in terms  
22 of --

23           THE COURT: Maybe, do you want to turn around and  
24 talk to Mr. Fischer, maybe you want to consult with him for  
25 a second.

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2 MR. GIOIA: In terms of the first question, in  
3 terms of if there are any other infringers, I have no issue  
4 with that.

5 THE COURT: Yeah, and they are different questions  
6 than were initially posed in the interrogatory.

7 MR. GIOIA: To the extent if that question is  
8 posed to my client, we will certainly answer that  
9 interrogatory.

10 THE COURT: Yes.

11 MR. GIOIA: I apologize, can you please restate  
12 the second question?

13 THE COURT: The second question is has he licensed  
14 anyone to use the trademarks independent of products that  
15 originate with Mr. Fischer?

16 MR. GIOIA: So almost analogous to this case where  
17 he's licensed the product but they can use it --

18 THE COURT: Licensed permitting someone to use the  
19 mark without buying products from Mr. Fischer, to use it  
20 with respect to products other than products that originate  
21 with Mr. Fischer?

22 MR. GIOIA: As phrased to that or sum and  
23 substance like that we'd have no problem answering that  
24 question.

25 THE COURT: Okay, I think that covers what you're

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2 looking for in number 2. Who his authorized distributors  
3 are with respect to his own products, I don't think is  
4 relevant.

5 MR. HUDSON: It is -- I'd like to address that  
6 right now.

7 THE COURT: Go ahead.

8 MR. HUDSON: Because it is relevant, Your Honor.  
9 When my client came out with their own product, again, you  
10 know, our own product is called Natural Honey Harvester,  
11 their product is called Bee-Quick, when my client came out  
12 with their own product they announced that they came out  
13 with their product because of their distributor was an  
14 unreliable supplier.

15 THE COURT: Can you say that again without the  
16 pronouns, with the they it becomes a little vague, I'm not  
17 sure who the they is.

18 MR. HUDSON: Sorry, Your Honor. So my client,  
19 well Brushy Mountain, the corporate entity, came out with a  
20 product called Natural Honey Harvester. They were initially  
21 purchasing the plaintiff's product called Bee-Quick, but  
22 they --

23 THE COURT: And they were selling the plaintiff's  
24 product under the mark Bee-Quick or something else?

25 MR. HUDSON: No, they were selling it, yes, under

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Bee-Quick.

THE COURT: Defendant was selling plaintiff's product under plaintiff's mark.

MR. HUDSON: Right, yes, sir.

THE COURT: Go ahead.

MR. HUDSON: And then, then they couldn't get a supply from the plaintiff so they came out with their own product called Natural Honey Harvester.

THE COURT: Right.

MR. HUDSON: And they started selling that. Well when they came out, when my client, excuse me, came out with their own product, Natural Honey Harvester, they, you know, they put on their website the reasoning is because --

THE COURT: I'm sorry, they put this on their website?

MR. HUDSON: I'm sorry, I keep saying pronouns. My client, Brushy Mountain, put on their website that they came out with a new product because their original supplier, the original supplier being plaintiff --

THE COURT: Right.

MR. HUDSON: Was unreliable. So now they've been hit, one of the causes of action in this complaint is the defamation cause of action for that statement. So the dealers of the plaintiff are important because we will know

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2 who those dealers are, we can take those dealers'  
3 depositions and determine presumably that they also had a  
4 problem with Mr. Fischer supplying the product.

5 THE COURT: So you want to assert truth as a  
6 defense to the defamation claim concerning the reliability  
7 of plaintiff as a supplier?

8 MR. HUDSON: Right, Your Honor.

9 THE COURT: So you want the names of plaintiff's  
10 distributors.

11 MR. HUDSON: Distributors and dealers.

12 MR. GIOIA: If I may interject, I apologize for  
13 cutting the train of thought off, plaintiff and myself are  
14 unaware of a defamation actually brought, I don't know if  
15 that was, I don't know that was interpreted. I don't think  
16 we brought a defamation claim.

17 THE COURT: Hold on a second, the defamation claim  
18 is asserted in what action, is it 1304 or --

19 MR. HUDSON: I think it's 1304.

20 THE COURT: One second, let me settle this once  
21 and for all.

22 MR. HUDSON: And it may not be titled defamation  
23 but --

24 THE COURT: Well, let's see, hold on.

25 MR. HUDSON: That's the gist of it.

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THE COURT: Hold on. I can bring up the complaint here, unless one of you has the complaint. Is there an amended complaint here or just the original complaint?

MR. HUDSON: There's a third amended complaint.

THE COURT: Third amended complaint, hold on one second. I see a second amended complaint, is there something after that, this was February, 2015?

MR. HUDSON: Yes, Your Honor, I believe it was December of 2015 was when the filed, we had a hearing in November and then they filed it like 30 days later.

THE COURT: In 1304?

MR. HUDSON: Yes, Your Honor.

THE COURT: Okay, I've got it. All right, there is a copyright claim, EMCA, trademark claims, do you know whereabouts in the third amended complaint these defamation claims are?

MR. HUDSON: I don't remember, Your Honor, I try to travel light and I didn't bring it with me.

THE COURT: Fair enough. Unfair competition. This is a misappropriation, plaintiff carefully monitors and controls the commercial use of his name, picture, image and likeness, plaintiff rarely allows his image to appear elsewhere, this is a misappropriation of plaintiff's likeness. False advertising?



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2 MR. HUDSON: He makes the allegation in the  
3 complaint that my client's statement is untrue.

4 THE COURT: The defendant's statement, this is  
5 paragraph 2010, paragraph 210, excuse me, "the defendant's  
6 statement on their 2011 webpage created and displayed under  
7 the director orders and personal supervision of the  
8 defendant states for years we have promoted the use of  
9 natural product to harvest honey, but an unreliable supply  
10 of such product has forced us to come out with our own."  
11 This includes several statements, natural product to harvest  
12 honey, unreliable, this is paragraph 210(B): "The  
13 'unreliable supply' claim is a blatant falsehood, defendants  
14 merely needed to prepay to get delivery at any time they  
15 pleased, otherwise production runs were made quarterly. The  
16 false statement gives the impression that plaintiff cannot  
17 produce his product which is disparagement." What do you  
18 say to that, Mr. Gioia?

19 MR. GIOIA: Hold on one second, Your Honor.

20 THE COURT: Sure.

21 MR. GIOIA: Your Honor, I could see that kind of  
22 construed it sounded like a defamation claim. To the extent  
23 that it does --

24 THE COURT: It's 43(A), it's false advertising,  
25 it's --

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2 MR. GIOIA: Well, yeah, there's a false  
3 advertising claim, there is no defamation claim.

4 THE COURT: No, it's not, but it's, it's false,  
5 the Lanham Act, among other things, prohibits false  
6 statements about a competitor's product. You know, there's  
7 been a lot of litigation, you see it in pain relievers, you  
8 know, that brand X is ten times more effective than brand Y,  
9 I mean if that's untrue it's a Lanham Act violation.

10 The other thing I guess is, you know, to the  
11 extent your asserting confidentiality, I'm not sure how your  
12 distributors are confidential. I mean ordinarily  
13 manufacturers or frequently on manufacturers' websites they  
14 have a list of authorized distributors so that people who  
15 want to buy it can know where to go to buy it. I mean if  
16 someone wants to buy Mr. Fischer's product who is in upstate  
17 in Chemung County, I mean you'd want that person to know  
18 where the distributor in Chemung is located.

19 MR. GIOIA: Our client has international business  
20 ties, so I know that --

21 THE COURT: Fair enough, but even if someone in  
22 Manchester, England, wants to buy plaintiff's products, I  
23 mean you'd want that person to know where in Manchester he  
24 can find a place that sells them ordinarily.

25 MR. GIOIA: Well to the extent that it is

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2 available on my client's website, I would say we were  
3 providing them with my client's website so they could find  
4 that information through another source. To the extent that  
5 that information is available other than that, my client  
6 does not want to disclose that information.

7 THE COURT: Why not, I'm not sure where the  
8 confidentiality issue is?

9 MR. GIOIA: The issue is this, Your Honor, we are  
10 talking about a very niche field --

11 THE COURT: Understood.

12 MR. GIOIA: I mean we're talking about a handful  
13 of people who supply bee products in this country. My  
14 client does not want the information getting out of who he  
15 markets, targets and direct as clients and dealers,  
16 especially because the basis of this whole entire claim is  
17 that they're trying to knock off his product and sell it to,  
18 presumably, I don't know who they're trying to sell it to,  
19 but could be trying to sell it to the same exact clients. My  
20 client doesn't want that information leaking out there.

21 But I also don't really see the relevance --

22 THE COURT: Well, I guess, you know, no, I mean  
23 it's relevant in light of the Lanham Act claim where you're  
24 attacking defendant's statement about reliability, it's  
25 relevant to that. I mean essentially they're trying to offer

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2 truth as a defense, that other distributors have had the  
3 same alleged problems with source of supply. So it's  
4 relevant to the Lanham Act claim. But I'm having a, it  
5 seems counterintuitive to me that a manufacturer of products  
6 would want to keep its distributors a secret. And, you know,  
7 whether or not this is entitled to confidential, whether or  
8 not it constitutes a trade secret depends on a lot of other,  
9 depends, and usually there is a multipart test which  
10 includes how much effort is expended to generate the list of  
11 distributors. I mean how many -- I'm just curious, do  
12 either side know approximately how many retailers there are  
13 for beekeeping products in the United States? I take your  
14 point that it's a niche market.

15 MR. HUDSON: I think the fact that it's a small  
16 market makes it even less likely that it's confidential  
17 because there are only a couple of suppliers and it's easy  
18 to find out. But I would say, I mean like big ones there are  
19 five or six, rather than just a mom and pop store, I mean my  
20 client is all over the US, we've got an office in North  
21 Carolina but also in Oregon.

22 MR. GIOIA: As per my client, he said there's  
23 20,000 internationally.

24 THE COURT: Well, you're willing to do eyes of  
25 counsel only on distributors?

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2 MR. HUDSON: Oh, yes, Your Honor, I don't want to  
3 put my clients in that position.

4 THE COURT: Why doesn't that eliminate the issue?

5 MR. GIOIA: My client would have proposed that to  
6 the extent that we will disclose this information, we'd  
7 rather it in camera first to determine the relevance and  
8 related --

9 THE COURT: No, the relevance, you know, look,  
10 telling me it's, you know, Joe's Bee Supplies or Bill's Bee  
11 Supplies isn't going to tell me anything. I mean it's not  
12 going to provide useful information to resolving this  
13 discovery dispute. But if you get it on an eye's of counsel  
14 basis only, such that Brushy Mountain is not, the people at  
15 Brushy Mountain are not going to see who your distributors  
16 are, why is that not adequate protection?

17 MR. GIOIA: Well here's what I would propose, Your  
18 Honor. I mean my client is --

19 THE COURT: Why don't you answer my question  
20 first, why is that not adequate protection?

21 MR. GIOIA: My client --

22 THE COURT: If you want to confer --

23 MR. GIOIA: No, no, no --

24 THE COURT: Let me finish, I know Mr. Fischer has  
25 very strong feelings about the case and I respect that, and

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if you want to take a minute to consult with him, feel free.

MR. GIOIA: I'll take a minute, thank you, Your Honor.

THE COURT: Okay, fine. If you want to have Mr. Fischer sit next to you, it's fine with me, it's up to you.

MR. GIOIA: He wants to sit in the back.

THE COURT: That's fine.

MR. GIOIA: Thank you, Your Honor.

THE COURT: My pleasure.

MR. GIOIA: I think we perhaps can come to some sort of resolution if it's amenable, you know, again, this would all be under protective order. I want to make it clear that my client, it's not a distrust or anything personal, is very protective of his, what he considers his trade secrets in that so much so we're not seeking any lost profits in this case, it's simply statutory damages. And he's made that clear.

To the extent that we can provide materials, we would only want that to be the distributor list for United States vendors, and I think that should hopefully encompass what is relevant to the case, notwithstanding whatever Mr. Hudson has to say on that issue. Not the individual level, on the level --

THE COURT: I'm sorry, say it again, please, I

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didn't --

MR. GIOIA: It would just be limited to distributors in the supply chain and nobody below that. And just for US based, not, you know, my client's international clientele --

THE COURT: So does your client sell directly to retail or do they sell to sort of a mid level distributor who then sells to retailers?

MR. GIOIA: Entirely mid level distributors. But he doesn't want anyone below that, retailers, being, first of all, obviously that would be a lot of information anyway.

THE COURT: All right, and that's under -- does that resolve it? Distributors and retailers are clearly not at the same class, if Mr. Fischer delivers 1,000 units to a distributor and the distributor decides for whatever reason he or she is going to favor retailer A over retailer B, and maybe retailer B has an issue with the reliability of supply, but in the hypothetical it's because the distributor is favoring A over B. Mr. Fischer has, once he sells it to the distributor, the distributor can do what he, she or it wants with it. I mean you get into a whole problem of, you know, what does the reliability, if there are delivery problems on the retailer level, who is responsible for those? It would seem to me that once you get who the

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distributors are, and if you want to go out and depose the distributors, that gets you pretty much what you need in terms of reliability.

MR. HUDSON: Yes, Your Honor, I agree, anybody he sells it to, he directly sells it to, I don't --

THE COURT: That's the distributors. Mr. Gioia has just told us he sells to distributors and the distributors in turn sell to retailers.

MR. HUDSON: That takes care of it, thank you, Your Honor.

MR. GIOIA: The interrogatory just said all entities (inaudible).

THE COURT: Okay. All right, so on two, what the plaintiff is going to provide are the identities of any other known infringers, if any. Entities to which he as licensed the mark or to which he has licensed his marks, independent of the sale of his products, or independently, I guess, of the sale of the products.

MR. GIOIA: And can we tailor that to be just national, is that okay?

THE COURT: You're not going to be seeking letters rogatory in this case, are you?

MR. HUDSON: Seeking what, excuse me, Your Honor?

THE COURT: Letters rogatory?



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MR. HUDSON: Oh, no, sir.

THE COURT: Hague Convention discovery --

MR. HUDSON: No, absolutely not.

THE COURT: Okay.

MR. HUDSON: But I think, you know, I do think maybe, you know, dealers in Canada will be applicable, I doubt he has any in Mexico, but maybe dealers in North America.

MR. GIOIA: My client is saying no.

THE COURT: Why not?

MR. GIOIA: I don't see the relevance --

THE COURT: North America I can understand, what's the problem with North America?

MR. GIOIA: I don't understand how he needs it to be tailored so large as to encompass all of North America. I feel like the United States, in and of itself, is sufficient to get the information that he's seeking, if any.

THE COURT: I think distributors in North America is appropriate given the nature of the allegation, okay, North America under a protective order.

All right, what's next?

MR. HUDSON: Eighteen, Your Honor, it's the last interrogatory.

THE COURT: One second. Provide the name, phone

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number and address of each blender, manufacturer, source or producer, packager, and/or distributor of plaintiff's Bee-Quick product. Well distributor we just covered in 2. And, okay, plaintiff objects to the information as not relevant to the subject matter of the litigation. All right, and why is this relevant?

MR. HUDSON: Your Honor, it also goes to the supply, a supply issue. If Mr. Fischer wasn't able to get a supply or wasn't placing the supplies with, you know, presumably he has a manufacturer or a blender --

THE COURT: Yeah, but then you'll get that from the distributor.

MR. HUDSON: But also, he claims that we make a cheap knockoff product and so his allegation is we have a cheap knockoff product, we can talk to the distributors and talk to them about the product and then we can, you know, we can, you know, after we know that then we can rebut his allegation there's a cheap knockoff product.

THE COURT: Is there a patent in issue here?

MR. HUDSON: No, Your Honor, but I mean there's some derogatory statements that he's making throughout his complaints that, you know, now available to the public. I mean knockoff is 20-something times --

THE COURT: Well, I'm not sure how, you know,

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2 let's assume plaintiff uses the Acme company to mix and  
3 bottle his product, what do you do with that? They use  
4 Acme, so what?

5 MR. HUDSON: So we can talk to Acme, one, and ask  
6 them about orders placed, you know, what their supply is,  
7 what their supply timing is, but also --

8 THE COURT: What does that get you?

9 MR. HUDSON: I think it goes back to our truth  
10 defense.

11 THE COURT: Well, no, if you're looking for the  
12 reliability of plaintiff as a source of supply, I think you  
13 get that information from the distributor. I mean even, you  
14 know, look, who the manufacturer is does not tell you how  
15 reliable plaintiff is in getting the product out to  
16 distributors. I mean maybe plaintiff has an inefficient  
17 ordering system and maybe things are backlogged in  
18 plaintiff's warehouse after he gets it from the compounder,  
19 from the entity that manufactures it. I'm not sure what the  
20 name of the entities that are involved in the manufacturing  
21 of this get you? I don't think --

22 MR. HUDSON: Well if they have an issue from their  
23 supplier --

24 THE COURT: I'm sorry?

25 MR. HUDSON: Let's say it's basically a toll

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2 blender that is blending this formula for Fischer, if they  
3 have an issue from their supplier, their chain supplier,  
4 they can't get the product to Fischer, that basically --

5 THE COURT: Yeah, you'll get that from the  
6 distributor. I mean if there's a downstream problem, you'll  
7 get it from the distributor. And conversely, I guess you  
8 want to look at it from another side, I mean let's assume  
9 Mr. Fischer has had these problems in the past, and he's got  
10 a reserve that he maintains in his warehouse so that he can  
11 maintain delivery from his suppliers, when his own suppliers  
12 have production problems or something else. I mean the  
13 reliability of Mr. Fischer as a source of this you're going  
14 to get from the distributors.

15 MR. HUDSON: Unless we're the only distributor  
16 during that time period. And at that point we need  
17 information about the toll blender about how fast they were  
18 making, how fast they were able to produce it --

19 THE COURT: No, but that still isn't going to tell  
20 you how fast Mr. Fischer is getting it to you.

21 MR. HUDSON: But that would be a reason why Mr.  
22 Fischer couldn't get it to us.

23 THE COURT: I think, if that's the theory of  
24 relevance, I think you get what you need from the  
25 distributors, I just don't see how this gets you the

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2 reliability of Mr. Fischer as a source.

3 MR. HUDSON: We'll stick with distributors for  
4 now.

5 THE COURT: You know, the other side of the coin  
6 is, look, if, in terms of reliability of Mr. Fischer as a  
7 source, it really doesn't matter whether there's good reason  
8 or bad reason. I mean if he's getting it to the distributors  
9 as they need it, he's reliable, if he's not, he's not  
10 reliable. Anything else you want to tell me on 18? I asked  
11 you a lot of questions, I interrupted you --

12 MR. HUDSON: No, no, I mean we'll deal with the  
13 distributors right now and if we can get the information out  
14 of that then we'll stick with it.

15 THE COURT: All right, so on 18 the objection is  
16 sustained. All right, any other interrogatories you want to  
17 talk about?

18 MR. HUDSON: No, Your Honor, that's it.

19 THE COURT: Okay, document requests?

20 MR. HUDSON: And document requests, I think we may  
21 have accomplished 13.

22 THE COURT: All right.

23 MR. HUDSON: Your Honor, 21.

24 THE COURT: Twenty-one, with respect to Fischer's  
25 Bee-Quick, all documents and things identifying the amount

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2 of product manufactured and shipped between January 1, 2009,  
3 and January 1, 2014. This appears to repeat the demand made  
4 in item 18. Let's see what 18 is.

5 MR. HUDSON: I'll submit, Your Honor, 18 has  
6 nothing to do with this.

7 MR. GIOIA: I could admit that it's slightly  
8 different but the demand, the objection still remains in.

9 THE COURT: Well, your objection is relevance, Mr.  
10 Gioia?

11 MR. GIOIA: No, it's overbroad and it seeks  
12 material that is not necessary to the litigation, how much  
13 my client produced and shipped.

14 THE COURT: Well what is your theory of relevance,  
15 Mr. Hudson?

16 MR. HUDSON: Again, I think it goes to the supply,  
17 we're going to have a good timeline, we're going to have a  
18 good chain of how much product was shipped between January,  
19 2009, to January, 2015, that 4 year period where, you know,  
20 presumably we're going to see, you know, there are time  
21 periods where there was no product shipped. And I'll take,  
22 because of our discussion, I'll take manufactured out of  
23 there, we'll just talk about shipped.

24 THE COURT: No, but in terms of, I mean, is the  
25 market for this product, for Mr. Fischer's product seasonal?

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2 I don't know anything about beekeeping, does it go up and  
3 down with the --

4 MR. GIOIA: Highly seasonal.

5 THE COURT: It is seasonal. I guess, you know, the  
6 question with reliability is are they meeting the  
7 distributors' demands, are they meeting the distributor's,  
8 the volume the distributors want? And I'm not sure the raw  
9 volume, the volume shipped tells you much in that regard.

10 MR. HUDSON: I think it will, Your Honor, I think  
11 it will tell us when, you know, when the shipments were  
12 made. Like people placed orders, you know, Brushy Mountain  
13 placed an order on X day, and, you know, nothing was  
14 shipped, not only to Brushy Mountain, which we're going to  
15 know that information, but shipped to any other distributors  
16 or any other dealers during that time.

17 THE COURT: Yeah, but why don't you get that from  
18 the distributors? I mean I guess, you know, the problem I  
19 have with the amount shipped is that it doesn't take into  
20 account the amount ordered. If, you know, in year 1  
21 distributor X has ordered 1,000 units, and in year 2  
22 distributor X orders 10 units, presumably plaintiff ships  
23 1,000 in year 1 and 10 in year 2, the fact that it shipped,  
24 you know, in each case it's met 100 percent of the  
25 distributor's orders, but the raw volume doesn't tell you

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anything about, the raw volume of the amount shipped does not tell you whether they're meeting the distributor's demands or not. And again, you'll get that, if you get the names of the distributors and you take discovery from the distributors, you will get much more probative evidence in that regard I think.

MR. HUDSON: We'll also have the evidence of we know when Brushy Mountain placed the orders.

THE COURT: Right.

MR. HUDSON: And we're going to see the top, I mean this was months --

THE COURT: You already know Brushy Mountain.

MR. HUDSON: Yeah, but we're going to have the independent documentation from Fischer to back up my client's testimony, that we place the order the next day --

THE COURT: You want the numbers as to what plaintiff shipped to Brushy Mountain? I mean you want that half, that half I don't think there's a problem with.

MR. HUDSON: I mean the other information of the other distributors, I know I can get it to the other distributors, too, but this is going to make a determination of which distributors I've got to go out and, you know, travel across the country and depose.

THE COURT: Well, you might start with a phone



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2 call to ask them whether they're happy or unhappy with Mr.  
3 Fischer's products before you decide to depose them.

4 MR. HUDSON: Right.

5 THE COURT: I would think you would. Well let me  
6 turn to Mr. Gioia for a minute, I mean, Mr. Gioia, does your  
7 client ship in response to orders from distributors or does  
8 it work some other way?

9 MR. GIOIA: It's usually in terms of response,  
10 correct? He does it usually quarterly, usually on a  
11 pattern, or based upon a response for a certain amount.

12 THE COURT: Um-hmm. Yeah, just the amount shipped  
13 I don't think really tells you anything about whether  
14 plaintiff is meeting the distributors' demands, or  
15 requirements, or needs. And that's the issue that you're  
16 trying to illuminate.

17 MR. HUDSON: Can we just limit it to Brushy  
18 Mountain and I'll get the information from the dealers?

19 THE COURT: All right, any objection to providing  
20 documentation concerning shipments to Brushy Mountain?

21 MR. GIOIA: No, that's relevant.

22 THE COURT: I'm sorry?

23 MR. GIOIA: That's relevant, yes, Your Honor.

24 THE COURT: Okay. All right, any other document  
25 requests at issue?

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MR. HUDSON: No, Your Honor, that's it.

THE COURT: Okay. All right, Mr. Gioia, anything you want to discuss today?

MR. GIOIA: No, Your Honor, we hashed out most things. Thank you for being here on a Friday afternoon before Memorial Day weekend, that's about all.

THE COURT: I'm here every Friday afternoon, almost every Friday afternoon.

MR. HUDSON: Thank you for your time, Your Honor.

THE COURT: My pleasure.

MR. GIOIA: Thank you, Your Honor.

THE COURT: Have a good weekend.

(Whereupon the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, Fischer v. Forrest, Docket #14cv1304, was prepared using PC-based transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Date: January 31, 2017